A

Iki Putra bin Mubarrak v Kerajaan Negeri Selangor

B FEDERAL COURT (PUTRAJAYA) — ORIGINAL JURISDICTION NO BKA-3–11 OF 2019(W)
ABANG ISKANDAR FCJ
14 MAY 2020

C *Constitutional Law — Legislature — Legislative competence — Selangor State Legislature ('SSL') enacted s 28 of Syariah Criminal Offences (Selangor) Enactment 1995 creating as offence matter which was already an offence under s 377A of the Penal Code — Whether SSL in enacting s 28 had legislated on a matter which belonged to the Federal List in Ninth Schedule of the Federal Constitution*
D *— Whether person charged under s 28 and who sought to challenge constitutionality of s 28 ought to be granted leave to do so under art 4(4) of Federal Constitution — Whether applicant had fulfilled requirements for leave to be granted*

E The instant application was to obtain leave of a Federal Court judge pursuant to art 4(4) of the Federal Constitution ('the FC') to challenge the constitutionality of s 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the Enactment'). The applicant was charged under s 28 of the Enactment in the Selangor Syariah High Court with attempting to commit
F sexual intercourse against the order of nature with certain male persons. He pleaded not guilty and his trial was stayed pending the outcome of the instant application. The applicant argued that 'in pith and substance' what was contained in s 28 had already been dealt with by federal law as an offence under ss 377A of the Penal Code. He said the Selangor State Legislature ('SSL') had
G contravened art 74 of the FC by enacting upon a matter that belonged to the Federal Legislative List in the Ninth Schedule of the FC. His instant application was to allow him leave to petition the Federal Court for a declaration that s 28 was null and void on the ground the SSL had legislated upon a matter with respect to which it had no power to make law. The
H applicant submitted that although the State Legislative List (List II) in the Ninth Schedule of the FC allowed the SSL to make laws with respect to the 'creation and punishment of offences by persons professing the religion of Islam against precepts of that religion', such power was subject to the preclusion clause 'except in regard to matters included in the Federal List'. The
I applicant submitted that as the matters contained in s 28 fell within the ambit of 'criminal law' in Item 4(h) of the Federal Legislative List in the Ninth Schedule of the FC, the SSL was precluded by the preclusion clause from enacting s 28. At the hearing of the application, the respondent raised the preliminary objection ('PO') that it should not have been cited as the

respondent in the instant proceedings as the State Government had no jurisdiction to execute, enforce or prosecute under the Enactment and on that basis the application was defective and should be struck out summarily. The respondent submitted that the applicant should have cited the Majlis Agama Islam Selangor ('MAIS') and/or the Jabatan Agama Islam Selangor ('JAIS') as respondents as they were concerned with the actual prosecution of the applicant.

Held, dismissing the PO and granting the application for leave:

(1) The applicant had fulfilled the requirements for leave to be granted. He had shown that he had an arguable case concerning the competency of the SSL to legislate on a matter which was on the Federal List and which had already been enacted as s 377A of the Penal Code. The application was not frivolous or an abuse of process of court. The applicant should be allowed to fully ventilate his case before the full court on the constitutionality and validity of the impugned provision. Inherent in the contentious issues between the parties was the extent to which the preclusion clause in Item 1 of the State List in the FC ought to operate in the circumstances of the case (see paras 31–32 & 34–35).

(2) Article 4(4) of the FC expressly provided that the cause papers in the instant application had to be served on the relevant state government so that it could be heard at the hearing of the leave application. Hence, the naming of the Selangor State Government as the respondent complied with the dictates of art 4(4) and there was no merit in the PO (see paras 10–11).

[Bahasa Malaysia summary

Permohonan ini adalah untuk mendapatkan kebenaran hakim Mahkamah Persekutuan mengikut perkara 4(4) Perlembagaan Persekutuan ('PP') untuk mencabar keperlembagaan s 28 Enakmen Jenayah Syariah (Selangor) 1995 ('Enakmen'). Pemohon didakwa di bawah s 28 Enakmen di Mahkamah Tinggi Syariah Selangor dengan percubaan untuk melakukan persetubuhan bertentangan dengan aturan tabii bersama lelaki. Dia mengaku tidak bersalah dan perbicaraannya ditangguhkan sementara menunggu keputusan permohonan ini. Pemohon berhujah bahawa 'secara inti patinya' apa yang terkandung dalam s 28 telah ditangani oleh undang-undang persekutuan sebagai kesalahan di bawah s 377A Kanun Keseksaan. Dia mengatakan bahawa Badan Perundangan Negeri Selangor ('SSL') telah melanggar perkara 74 PP dengan menetapkan perkara yang termasuk dalam Senarai Perundangan Persekutuan dalam Jadual Kesembilan PP. Permohonannya ini adalah untuk membenarkannya kebenaran untuk mempetisyen di Mahkamah Persekutuan untuk pengisytiharan bahawa s 28 adalah batal dengan alasan SSL telah membuat undang-undang mengenai suatu perkara yang tidak mempunyai kuasa untuk membuat undang-undang. Pemohon mengemukakan bahawa

walaupun Senarai Perundangan Negeri (Senarai II) dalam Jadual Kesembilan PP membenarkan SSL membuat undang-undang berkenaan dengan 'pewujudan dan penghukuman kesalahan yang dilakukan oleh orang yang menganut agama Islam terhadap perintah agama itu', kuasa tersebut tertakluk kepada klausa penutupan 'kecuali berkenaan dengan perkara yang termasuk dalam Senarai Persekutuan'. Pemohon berhujah bahawa kerana perkara-perkara yang terkandung dalam s 28 termasuk dalam 'undang-undang jenayah' dalam butiran 4(h) Senarai Perundangan Persekutuan dalam Jadual Kesembilan PP, SSL dilarang oleh klausa pencegahan daripada mewartakan s 28. Pada pendengaran permohonan itu, responden mengemukakan bantahan awal ('PO') bahawa tidak seharusnya dikemukakan sebagai responden dalam prosiding ini kerana Kerajaan Negeri tidak mempunyai bidang kuasa untuk melaksanakan, menguatkuasakan atau mendakwa di bawah Enakmen dan atas dasar itu, permohonan itu cacat dan harus dibatalkan terus. Responden berhujah bahawa pemohon seharusnya mengemukakan Majlis Agama Islam Selangor ('MAIS') dan/atau Jabatan Agama Islam Selangor ('JAIS') sebagai responden kerana mereka berkenaan dengan pendakwaan sebenar pemohon.

Diputuskan, menolak PO dan membenarkan permohonan untuk kebenaran:

(1) Pemohon telah memenuhi syarat untuk mendapat kebenaran. Dia telah menunjukkan bahawa dia memiliki kes yang boleh dihujah mengenai kelayakan SSL untuk membuat undang-undang mengenai suatu hal yang ada dalam Senarai Persekutuan dan yang telah ditetapkan sebagai s 377A Kanun Keseksaan. Permohonan itu tidak remeh atau penyalahgunaan proses mahkamah. Pemohon harus dibenarkan untuk memventilasi kesnya sepenuhnya di mahkamah mengenai perlembagaan dan kesahihan peruntukan yang dipersoalkan. Terkandung dalam isu yang diperdebatkan antara pihak adalah sejauh mana klausa pencegahan dalam Butiran 1 Senarai Negari PP harus beroperasi dalam keadaan kes ini (lihat perenggan 31–32 & 34–35).

(2) Perkara 4(4) PP secara khusus menyatakan bahawa kertas kausa dalam permohonan ini harus disampaikan kepada kerajaan negeri yang berkaitan supaya dapat didengar pada saat pendengaran permohonan kebenaran. Oleh itu, penamaan Kerajaan Negeri Selangor sebagai responden mematuhi perintah Perkara 4(4) dan tidak ada merit dalam PO (lihat perenggan 10 & 11).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112; [1976] 1 LNS 3, FC (refd)

East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia [1980] 2 MLJ 143; [1980]1 LNS 18, FC (refd)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, SC (refd)

Mamat bin Daud & Ors v Government of Malaysia [1986] 2 MLJ 192, SC (refd)
Ramasamy a/l Shanmugam v State Government of Penang and Government of Malaysia [1986] 2 MLJ 188; [1986] CLJ Rep 238, SC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, FC (refd)
ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153, FC (refd)

Legislation referred to

Federal Constitution arts 3, 4(3), (4), 11(4), 74, 74(2), 75, 128(1)(a), Ninth Schedule, List I, Federal List, items 4, 4(h), List II, State List, item 1
Penal Code ss 377, 377A, 377B, 377C, 377D, 377E
Syariah Criminal Offences (Selangor) Enactment 1995

Surendra Ananth (Tan Law Practice) for the appellant.
Masri bin Mohd Daud (Siti Fatimah bt Talib with him) (State Legal Advisor, Selangor State Legal Advisor's Office) for the respondent.

Abang Iskandar FCJ (delivering judgment of the court):

BACKGROUND FACTS OF CASE

[1] On 21 August 2019, the Chief Syarie Prosecutor through the Syariah Prosecutor decided to proffer a charge against Iki Putra bin Mubarrak ('the applicant') in Selangor Syariah High Court No 10100–153–0020–2019.

[2] In essence, it was alleged that the applicant had on 9 November 2018, between 9–10.30pm in a house in Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons.

[3] The charge was that the applicant had attempted to commit an offence punishable under the Syariah Criminal Offences (Selangor) Enactment 1995 ('the Enactment'). The relevant offence that the applicant was alleged to have attempted to commit was contained under s 28 of the Enactment ('the impugned provision'). The applicant pleaded not guilty to the charge. His trial in the Syariah Court has been stayed pending the outcome of this application on the challenge he is making with respect to the constitutionality of the impugned provision in the Enactment with which he is being charged under.

THE LEAVE APPLICATION

[4] The applicant, through the notice of motion dated 28 November 2019, made an application from this court for, among others, leave to commence proceedings against Kerajaan Negeri Selangor ('the respondent') be given

pursuant to art 4(4) of the Federal Constitution ('the FC'). It is in the exercise of the Federal Court's original jurisdiction under arts 4(3) and 128(1)(a) of the FC by way of a petition for a declaration that the impugned provision is invalid on the ground that the Legislature of the State of Selangor ('LSS') makes provision with respect to a matter to which it has no power to make laws and is therefore null and void.

BASIS FOR THE CHALLENGE

[5] In support of the leave application, the applicant, vide his affidavit in support dated 28 November 2019, grounded his application on the following grounds:

(a) in item 1, List II (State List), Ninth Schedule of the FC allows the LSS to make laws on the 'creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List' (read together with art 74 of the FC);

(b) the impugned provision was made pursuant to this legislative field. However, the impugned provision is a matter included in the Federal List, specifically, item 4(h), List I (Federal List), Ninth Schedule, of the FC, that is the 'creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law';

(c) the impugned provision is dealt with by a federal law, that is the Penal Code specifically ss 377–377E, either one or all of them;

(d) in any event, the impugned provision is a matter that can be dealt with under federal law, as it falls within the ambit of criminal law in item 4, List I (Federal List), Ninth Schedule, of the FC, which includes all matters that could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere;

(e) further and/or alternatively, the impugned provision is in pith and substance concerning matters already dealt with under the Penal Code (Act 574) and/or can be dealt with under federal law; and

(f) in view of the foregoing, the impugned provision is beyond the legislative competence of the LSS.

[6] In the *afidavit jawapan responden* (encl 18), affirmed by Abu Bakar bin Daud, the State of Selangor, Head of Syarie Prosecutor, the respondent raised preliminary objection ('the PO') in that the applicant had wrongly named Kerajaan Negeri Selangor as respondent in this action because Kerajaan Negeri Selangor has no jurisdiction to execute, enforce or prosecute under the

Enactment. Thus, the application is defective and should be struck out in limine. A

[7] In opposing the application, in brief, the respondent averred, among others, that the impugned provision is not inconsistent with item 1, List II (State List), Ninth Schedule, of the FC and is consistent with art 74(2) of the FC. While the Enactment is only applicable to Muslims, ss 377–377E of the Penal Code are applicable to all citizens of the country. B

[8] Articles 3, 11(4) and 74 of the FC confer power upon the State Legislature to make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List. Muslims are subject to both laws enacted by the Parliament and State Legislative. Therefore, LSS has power to make the impugned provision and the Head of Syarie Prosecutor has power to enforce the same upon Muslim. C D

DELIBERATIONS AND FINDINGS

[9] As indicated earlier, the respondent had raised two issues. Firstly, with regard to the PO and secondly as a reply to the applicant's application. I shall deal with the PO first. The PO was based on the contention by the respondent that other parties ought to be made parties in this application and that the omission on the part of the applicant to do so was fatal. Learned counsel for the respondent submitted that Majlis Agama Islam Selangor ('MAIS') and/or Jabatan Agama Islam Selangor ('JAIS') ought to be made parties to this proceeding. Reason being that, these bodies have better understanding on the matter at hand as they are concerned with the actual prosecution of the applicant in the Syariah Court. Learned counsel for the applicant replied to the effect that those bodies were the implementing agencies of the Enactment which houses the impugned provision, namely s 28 which creates the offence of unnatural sex acts, for being acts against the precepts of Islam. E F G

[10] Having considered the respective submissions, I agree with the contention of learned counsel for the applicant that by the very wordings of art 4(4) of the FC, where a challenge is mounted premised upon the allegation that the impugned provision was made by a State Legislature upon a matter for which the State Legislature is incompetent to so legislate, it is expressly provided that in such a situation, the relevant state government must be served with the cause papers so that it could heard by submitting during the leave application. In the context of this application, the naming of the government of the State of Selangor had, to my mind, complied with the dictates of the said art 4(4) of the FC. In other words, it is a constitutional requirement that the state government of the relevant State be heard in defence of the validity of the H I

statutory provision that is being impugned. I also agree with learned counsel for the applicant that as this is only an application for leave, other parties may apply to be made as interveners if they are of the view that they have legitimate interest, during the ventilation of the petition proper in the event that this application for leave is allowed. At this stage we are concerned only with the issue of whether leave ought to be granted to ventilate further on the question of whether the impugned provision was properly enacted by the respondent in the first place. Put in another way, whether the LSS was competent to enact the impugned provision, to wit, s 28 of the Enactment.

[11] Premised on the considerations above-stated, I find that the PO raised by the learned senior federal counsel ('SFC') clearly, with respect, has lacked any merit and I therefore hereby dismiss it.

[12] In relation to the submissions on the main application, the respondent submitted that this application for leave was frivolous and deserved to be dismissed.

[13] It must be recalled that this has been an application for leave before a Federal Court judge sitting alone and made pursuant to art 4(4) of the FC. I must hasten to add that this is the correct approach to be pursued in this case because, in essence, it has involved the question of whether the LSS has in fact, when enacting the impugned provision in the said Enactment of 1995, transgressed into List 1, the Federal List of the FC. This relates to a competency issue, in the sense that it involves the question of whether the Federal Parliament or a State Legislature having passed laws on a matter that does not belong in their respective lists.

[14] In the context of this application, the complaint by the applicant was that the LSS had in fact transgressed beyond and into the Federal List when it legislated the impugned provision as contained in the Enactment. Perhaps, it would be opportune to reproduce the submissions as they were articulated on behalf of the applicant, thus:

> 6.2. The Impugned Section was enacted under the legislative field of precepts of Islam. The said field however has an express preclusion clause which states, *'except in regard to matters included in the Federal List'.*
>
> 6.3. Item 4(h), Federal List provides:
>
> > 4. Civil and criminal law and procedure and the administration of justice, including —
> >
> > *(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;*
>
> 6.4. The subject matter of the Impugned Section, that is 'Sexual intercourse against

the order of nature' is a matter 'dealt with by federal law'.

a. ...

b. ...

c. ...

6.5. As is apparent, the Penal Code already deals with the subject matter of the Impugned Section. This in itself ousts the legislative competency of the SSL to make laws on the matter ...

6.6. In any event, the subject matter of the Impugned Section falls within Parliament's exclusive power over 'criminal law'.

a. The term 'criminal law' traditionally referred to acts and omissions that are prohibited by penal provisions. However, as recognized by this court in *Sulaiman Takrib*, the said definition is too wide and would render all offences as 'criminal law' ...

b. This was also a problem in Canada, which similarly being a federation with a division of legislative power between its Federal Parliament and the provincial legislatures. As in Malaysia, if there is a conflict between a federal law and a provincial law, the former prevails and the latter is displaced. Furthermore, criminal law is a matter within the domain of the Federal Parliament. The Canadian cases are therefore instructive in looking at the legislative field of 'criminal law' ...

c. The Canadian Supreme Court recognized the problem with the traditional definition of 'criminal law' which was too wide and would allow the Federal Parliament to colourably legislate on matters in the Provincial List under the guise of 'criminal law' ...

d. In summary, for a law to be a valid criminal law, it must have a valid public purpose. This was expanded further by the Canadian Supreme Court in *Reference re Assisted Human Reproduction Act* [2010] 3 SCR 457, ...

e. In essence, a valid 'criminal law' must be a law which: first. Provides for an offence; second, is backed by a penalty; and third, has a criminal law purpose, that is to address a public concern relating to peace, order, security, morality, health or some similar purpose.

f. There is no reason why this definition should not be adopted in Malaysia. The existence of the Islamic criminal law system in its current form does not detract from this conclusion. The FC enables the creation of such a system purely for personal law purposes. This was judicially recognized by this Honourable Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, ...

6.7. In striking a balance with the legislative field on precepts of Islam in Item 1, State List, the preclusion clause (as to matters in the Federal List) is critical.

a. There is no need to deal with the question of what precepts of Islam means. No matter how widely the term is defined, the legislative power to

create offences against precepts is circumscribed by the preclusion clause that is matters in the Federal List which includes 'criminal law'.

b. When the offence sought to be created by the State Legislatures pursuant to Item 1, State List pertains to what could reasonably be viewed as a matter of public concern relating to peace, order, security, morality, health, or some similar purpose, in the public sphere, State Legislatures cease having the power to do so. It is in this way that power to create personal law offences under Item 1, State List is balanced against the power to create (or not create) offences in the public sphere under Item 4, Federal List.

6.8. The subject matter of the Impugned Section, that is sexual intercourse against the order of nature, arguably has a valid criminal law purpose.

a. Sections 377 and 377A, Penal Code were present in the code prior to independence. The Penal Code was substantially based on the Indian Penal Code 1860.

b. Sexual intercourse against the order of nature was dealt with under the former section 377 of the Indian Penal Code which provided:

377. Unnatural offences. — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

c. The said section was based on English law at that material time. The purpose of the law was on the ground of morality as perceived at that material time ...

d. As noted above, this is a valid criminal law purpose.

6.9. As Parliament is empowered under item 4, Federal List to enact ssections 377 and 377A, Penal Code, the SSL is necessarily precluded from doing so under Item 1, State List.

a. In *Mamat Bin Daud v Government of Malaysia* [1988] 1 MLJ 119, this court did not consider the preclusion the clause in Item 1, State List.

b. The majority found that the subject matter of the law in question, that is section 298A, Penal Code, was a matter that fell within a number of legislative fields that belong to the states, including Article 11 (4), FC ...

c. The majority found that the subject matter of section 298A, Penal Code, that is on religious doctrine, fell within the exclusive purview of the State Legislatures under various legislative fields which do not have a similar preclusion clause as in the precepts of Islam field.

d. In the present case, the Impugned Section only falls within the precepts of Islam legislative field. It is therefore caught by the preclusion clause.

[15] Premised on the above, it was the contention of the applicant that there

is merit in this leave application in that it was far from being a frivolous application or otherwise an abuse of the court process. It was one that merited further and fuller and mature ventilation in a substantive hearing, before a fuller Federal Court panel.

[16] On the other hand, the learned SFC had submitted before me that there was nothing amiss with the LSS legislating of the impugned provision in the enactment. The thrust of his submission had been that the impugned provision is not identical with the provisions as contained under s 377A of the Penal Code. He had pointed out that the two provisions under scrutiny were different even in the extent of their punishment provisions. He further contended, as could be seen in para 24.8 of his written submissions where it was emphasised that there was nothing wrong as long as the accused person was not prosecuted twice for the same offence. I would translate this to mean that nothing would be amiss for a Muslim person alleged to have committed a sexual act against the order of nature to be prosecuted only under the impugned provision, as long as he is also not prosecuted under s 377A of the Penal Code. I reproduce para 24.8 of his written submissions, below like so:

> 24.8 Seksyen 59 Akta 388 jelas menyatakan di mana satu perlakuan atau peninggalan adalah satu kesalahan di bawah dua atau lebih undang-undang bertulis, pesalah boleh didakwa dan dihukumi di bawah undang-undang yang mana satu, selagi beliau tidak didakwa dan dihukumi dua kali untuk kesalahan yang sama. Oleh yang demikian di mana pesalah melakukan kesalahan yang boleh dibicarakan sama ada oleh Mahkamah Sivil atau Mahkamah Syariah, beliau boleh didakwa dalam mana-mana mahkamah tersebut.

[17] The learned counsel for the applicant replied that the issue had concerned whether the LSS had, in the first place, the required power under the FC to even legislate the impugned provision. According to him, it was not, at least not at this stage, a question of its implementation. He relied on the doctrine of pith and substance in determining whether the LSS had legislated on a matter that rightly, he had submitted, belonged in the Federal List of the FC. Based upon that doctrine, it was his submission before this court that when the LSS legislated the impugned provision, it was legislating on a matter that had touched on criminal law, a matter listed as Item 4(h) of the Federal List.

[18] It was also contended by learned SFC that the Muslims in Malaysia are subject to two sets of laws, namely the civil law system which applies to everybody, as well as the Muslim law system. His argument had run like so:

> 24.1 Mahkamah Persekutuan telahpun memutuskan bahawa orang Islam bukan sahaja tertakluk kepada undang-undang awam yang digubal oleh Parlimen tetapi juga tertakluk kepada undang-undang Negeri yang bersifat keagamaan yang digubal oleh Badan Perundangan Negeri.

24.2 Perlembagaan telah memberikan kuasa kepada Badan Perundangan Negeri untuk menggubal dan menguatkuasakan undang-undang kesalahan terhadap orang-orang Islam.

24.3 Perlembagaan telah membenarkan orang-orang Islam di negara ini ditadbir oleh undang-undang peribadi Islam. EJSS 1995 hanya terpakai untuk orang-orang Islam di Negeri Selangor.

24.4 Oleh itu, orang-orang Islam adalah tertakluk kepada kedua dua undang-undang awam yang digubal oleh Parlimen dan juga undang-undang Negeri yang digubal oleh Badan Perundangan Negeri.

24.5 Peruntukkan seksyen 28 EJSS 1995 adalah sah dan tidak bercanggah dengan Item 1, Senarai II (Senarai Negeri), Jadual Kesembilan, Perlembagaan dan selari dengan Perkara 74 Perlembagaan Persekutuan.

[19] He had cited the case of *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153 where the apex court there had made the following remark, which goes:

> [31] In conclusion we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by Legislature of a state. This is because the Federal Constitution allows the Legislature of a state to legislate and enact offences against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state.

[20] Having perused the submissions advanced by both learned counsel before me, I agree with learned counsel for the applicant that the submissions that essentially formed the reply by the respondent did not sufficiently, or at all, address the gravamen of the applicant's complaint. The applicant's complaint sought to challenge the very issue of the competency of the LSS to even legislate the impugned provision creating for an offence under the Enactment. The applicant had alleged that the LSS had transgressed into the Federal List, by legislating on a matter on that list, or dealt with by federal law, namely item 4(h) on List 1 of the FC. As could be seen in the preceding paragraphs, the learned SFC for the respondent, had submitted that the impugned provision in the Enactment, was not identical with the federal law, as contained in the Penal Code, to wit, s 377A of the Penal Code.

[21] At this juncture, it would help if the two provisions under scrutiny are reproduced for ease of reference. Section 28 of the Enactment reads as follows:

> Section 28. Sexual intercourse against the order of nature.
>
> Any person who performs sexual intercourse against the order of nature with any

man, woman or animal is guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

[22] Section 377A of the Penal Code reads as follows:

377A Carnal intercourse against the order of nature

Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

[23] As the two provisions under scrutiny were not identical, it was submitted by learned SFC that this application was a frivolous one, devoid of any merit, and therefore ought to be dismissed with costs.

[24] To my mind, with respect, the pivotal issue here is whether in legislating the impugned provision, the LSS was competent to do so, in light of the Federal List, in particular item 4(h) which itemised criminal law as a matter that is expressly enumerated under that List 1, namely the Federal List or a matter dealt with by federal law. Whether or not the two above-quoted statutory provisions are not identical with each other, may be a relevant consideration, but definitely it is not a conclusive determinant factor in resolving the issue at hand, as raised in the applicant's complaint.

[25] The LSS had, as was submitted by the learned SFC, legislated the s 28 on the basis that it had jurisdiction in legislating Islamic law, and that the impugned s 28 was aimed at addressing unnatural sexual acts, as being acts which are against the precepts of Islam.

[26] As regards the contention by learned SFC that Muslims in Malaysia are subject to two sets of law, learned counsel for the applicant submitted that he had no quarrel with that, but not without qualification. With respect, I agree with him. As a statement of general principle, the contention that Muslims in Malaysia are subject to two sets of laws is not necessarily incorrect, *ipso facto.* But that would be subject to the overarching caveat that in so far as they being subject to Muslim law, the Muslim law that seeks to bind them must be first be constitutionally legislated. This is so because although the State Legislature is clothed with the power to legislate on matters that pertain to the precept of Islam, that very same power is subject to what may be termed as a *preclusion clause* which is expressly provided for inside the enabling item 1, of the State List itself. Item 1 of the State List reads as follows:

LIST II — STATE LIST

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the DEFINITION and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List;* the constitution, Organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (Emphasis added.)

[27] In this regard, it was submitted for the applicant that since the Federal Legislature, being the Parliament, had already legislated for offences aimed at criminalising sexual acts by man with animals and sexual acts by man with another person that go against the order of nature, the competency of the state Legislature to legislate like offences for sexual acts against the precepts of Islam, which are similar with the Federal criminal law provisions as contained in the Penal Code, is effectively precluded on account of the preclusion clause in item 1 in the State List.

[28] In *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354 ('*Sulaiman Takrib* case'), Abdul Hamid Mohamad CJ said:

> [72] Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in *Mamat bin Daud* too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. I would prefer that the issue be decided on a case to case basis. However, if for example, a similar offence has been created and is found in the federal law since even prior to the Merdeka Day that must be accepted as 'criminal law'. But, where no similar 'criminal law' offence has been created, then, as in the case of *Mamat bin Daud,* the court would have decide on it.

[29] In the circumstances of this present application, it was submitted by learned counsel for the applicant that in light of the existence of s 377A of the

Penal Code, a statute passed by the Federal Legislature, the impugned provision could not, in all probabilities, be regarded as having been constitutionally legislated by the LSS and is therefore invalid, null and of no effect.

[30] Now, what is the threshold that needed to be surpassed in an application for leave pursuant to an art 4(4) of the FC? In the case of *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192 the leave panel there had shown what would be required of the applicant in order to be successful in such an application of this kind. Learned Justice Mohd Azmi bin Kamaruddin SCJ had held as follows:

> For the applicants to succeed, they must satisfy the court firstly that leave is necessary under art 4(4) and secondly, that they have an arguable case in that the application is not frivolous.

[31] Bearing that in mind, it is my finding that leave is indeed necessary for this application before this complaint by the applicant could find its way to be fully argued and ventilated before the Federal Court. Leave is necessary because it involves a challenge premised on whether the LSS was legislatively competent when it enacted the impugned provision, in light of the fact that s 377A of the Penal Code appeared to be already in place when the former (Impugned Provision) was enacted by the LSS, and the latter being a federal legislation legislated pursuant to item 4(h) of the Federal List under the FC. As such, leave of the court is required under art 4(4) of the FC and this application has fulfilled the requirements of art 4(3) of the FC in that it being a challenge premised on an alleged lack of competency on the part of LSS to enact the impugned provision (see, *East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia* [1980] 2 MLJ 143; [1980]1 LNS 18 (FC); *Ramasamy a/l Shanmugam v State Government of Penang and Government of Malaysia* [1986] 2 MLJ 188; [1986] CLJ Rep 238; and *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3 (FC)).

[32] As to whether this application is a frivolous one, I had occasion to consider the submissions and the materials placed before me by both learned counsel and I am of the view that this has not been a frivolous application. In fact, far from it, there are merits that are quite apparent in the contentions of the applicant which, to my mind, deserve mature ventilation before the full court on the constitutionality and validity of the impugned provision. See, the then Supreme Court case of *Mamat bin Daud & Ors v Government of Malaysia* where it was held, inter alia, as the challenge mounted before the court for leave was concerned with the validity of the legislation on a matter with respect to which Parliament has no power to make law, such application on its facts should be allowed as it was *not frivolous*. The leave panel of the then apex court therefore granted the leave applied for so as to allow 'the applicants to canvass

their case before the full court on the constitutionality and validity of the new section 298A of the Penal Code'.

[33] Indeed, this application before me has been the opposite of what was challenged in the *Mamat bin Daud* case in that, if it is to be recalled, there it was the Federal Legislature, the Parliament that was alleged to have transgressed into a matter which would appear to be within the exclusive legislative domain of the State Legislature, to wit, a matter pertaining to Islamic law. Whereas in this instant case, it was the State Legislature (of Selangor) that was alleged to have transgressed into the exclusive legislative domain of Parliament on matters pertaining to criminal law as contained in Item 4(h) of the First List, or a matter dealt with by federal law, otherwise commonly referred to as the Federal List. I have deliberately used the words 'exclusive legislative domain' when referring to the Federal and State Lists. That is because there exists the List III, otherwise referred to as the Concurrent List in the FC, wherein matters, upon which both Federal and State Legislatures are competent to legislate on, are listed therein, for instance, matters on culture and sports, public health, drainage and irrigation, among others. Yet again, the State Legislature shall not legislate on those matters in the Concurrent List, such that they are inconsistent with what the Federal Parliament has already legislated in the latter's exercise of its power pursuant to the Concurrent List. If such a situation arises, the provisions of the Federal Parliament shall prevail over the inconsistent State Legislature's provisions (see, art 75 of the FC).

[34] Inherent in this contentious issue between the parties in this application, would be the proper extent to which the preclusion clause ought to operate, in the circumstances of this case. The learned SFC had submitted that the impugned provision was not identical with the provisions under s 377A of the Penal Code, which would be apparent, if the former were to be juxtaposed next to the latter. To this, learned counsel for the applicant had responded by saying that one would have to look at the 'pith and substance' of the provisions under scrutiny. Briefly, according to the doctrine of 'pith and substance', where the question arises in determining whether a particular law relates to a particular subject (mentioned in one list or another), the court looks to the *substance* of the matter. That would have to be ventilated before the fuller apex court panel that will hear the substantive application. As was observed by the learned counsel for the applicant, in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, this court did not consider the preclusion clause in Item 1, State List in the FC. Perhaps, in that case, there was no need for Their Lordships then, to consider the preclusion clause on the factual matrix as presented before them.

CONCLUSION

[35] Viewing this application in its totality, I am of the considered view that this is application has fulfilled the two requirements, namely: (1) that leave is required and necessary as the applicant had shown that this complaint of his involved the question of competency of the LSS to legislate on a matter that is on the Federal List; and (2) this application has not been one that could, in all fairness, be termed as frivolous or an abuse of the court process. The applicant had shown that he had an arguable case. Leave ought to be granted in this application before me, so as to allow, borrowing the words of Justice Azmi Kamaruddin SCJ in *Mamat bin Daud*'s case 'the applicant(s) to canvass their case before the full court on the constitutionality and validity' of the impugned provision. I therefore hereby grant the application for leave in terms, as per encl 1.

[36] I am of the view as well that costs ought to be in the cause. That, I so order now.

PO dismissed and application for leave granted.

Reported by Ashok Kumar